SUPREME COURT, U. S.

FILED

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E. ROBERT SEAVER, CLER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1125

LEON FERGUSON,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

On Petition for a Writ of Certiorari
To The Supreme Court of Ohio

BRIEF FOR RESPONDENT IN OPPOSITION

WILLIAM F. MCKEE,
3 North Main Street,
Mansfield, Ohio 44902,
Counsel for Respondent.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43215

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OPINIONS BELOW

The opinions below are unreported but are contained in the petition of petitioner .

JURISDICTION

The purported jurisdictional requisites as set forth in the petition are not applicable, and there is no basis for jurisdiction in this court.

QUESTIONS PRESENTED

Whether petitioner after being represented by able counsel of his own choosing after plea bargaining and having a charge of murder in the second degree reduced to manslaughter to which he was able to plead Guilty,

may state that he was denied due process in that he was unaware of his consitutional rights after petition for Post Conviction Relief in which the only evidence presented was that there were adequate constitutional waivers and may introduce additional evidence in the appellate courts to attempt to reverse a finding that the plea was voluntarily entered and to seek a retroactive application of *Boykin v. Alabama*, 395 U.S. 238.

STATEMENT OF THE CASE

Defendant-Appellant, herein referred to as defendant, was charged with murder in the second degree in the Court of Common Pleas of Richland County. He appeared for arraignment on February 10, 1964, with Attorney (now Congressman) Louis Stokes, who he had personally selected and hired and entered a plea of Not Guilty. Subsequently an additional plea of Not Guilty by reason of insanity was filed in writing by defendant's counsel and the defendant was conveyed to Lima State Hospital for psychiatric examination. An order by the Court of Common Pleas dated May 8, 1964, states that the report from Lima was received and that the defendant would be considered sane.

On May 22, 1964, defendant again appeared in the Court of Common Pleas with his counsel at which time the prosecutor indicated to the court that through conference with defense counsel, defendant wished to plead further and defendant by his counsel moved the court to withdraw his plea of Not Guilty and Not Guilty by reason of insanity and that he be allowed to plead Guilty to a lesser included offense of manslaughter. The court then amended the indictment and sustained defendant's motion for leave to plead Guilty. The court further inquired of the defendant if he had anything to say why sentence should not be pronounced against him and defendant stated, "I can't think of anything to say why

sentence should not be pronounced against me." The court sentenced defendant to one (1) to twenty (20) years in the Ohio State Penitentiary. No direct appeal was ever taken from this decision of the Court of Common Pleas. Defendant has been incarcerated in the Ohio State Penitentiary since shortly after May 22, 1964.

On June 30, 1969, defendant filed his petition for Post Conviction Relief alleging that the Guilty plea was void because secured in violation of rights guaranteed by Due Process Clause of the Fourteenth Amendment. A certified copy of the complete transcript of the May 22 arraignment was attached to the petition. This transcript indicated the court had earlier gone over constitutional waivers. Defendant, represented by present counsel, did not offer in evidence any prior transcripts and did not present any evidence that he was not fully advised by the court or his counsel, or that the transcript was in error.

The Court of Common Pleas denied relief and in its journal entry of October 31, 1969, stated that "the constitutional issues had been explained to defendant at the initial arraignment upon indictment." Defendant then appealed this finding to the Court of Appeals of Richland County, Fifth District. Defendant then for the first time attempted to enter transcripts which were not before the Common Pleas Court. On March 18, 1970, said Court of Appeals unanimously affirmed the holding of the Common Pleas Court. On September 24, 1970, The Supreme Court of Ohio found no substantial constitutional issue to exist and overruled the motion for leave to appeal.

ARGUMENT

Basically, the Common Pleas Court of Richland County, Ohio, in considering defendant's petition for Post Conviction Relief, had before it a relatively simple set of facts as initially presented. Defendant's own coun-

sel actively represented him at numerous trial proceedings, including a mental examination at Lima State Hospital, and actively plea bargained on his part. After such vigorous representation defendant's counsel, in open court with defendant present, moved to enter a plea to a lesser charge. The court accepted defendant's motion and if at any point court erred, it was led into such error by the active position of defendant and his counsel. Despite numerous court appearances defendant, by his present counsel in filing for relief, presented the transcript of only one of several hearings being the transcript of the final proceeding. The sole evidence before the trial court was that all constitutional issues had been explained and defendant was entering a voluntary plea to a lesser charge than what he had been indicted for. Only after the trial court entered its ruling denying the relief did defendant and his counsel seek to present additional evidence in the appellate courts indicating that all constitutional issues may not have been explained and that for that reason the plea might be defective. Even such additional evidence indicated that defendant's counsel had fully advised him of his rights, defendant at no time ever indicating that he might be innocent.

Even if this court would judge this issue on the basis of additional evidence which was not before the trial court when it denied Post Conviction Relief, the effect of petitioner's request is to seek to have *Boykin v. Alabama* applied retroactively. This court in *Halliday v. United States*, 394 U.S. 831, refused to apply *McCarthy v. United States*, 394 U.S. 459, retroactively. The same logic which was then applied is equally applicable in the present case. It is especially pertinent to note that the court stated it would consider the effect retroactive application would have upon the administration of jus-

tice. An examination of the State rulings clearly indicates that such a retroactive application would be staggering to the imagination to contemplate the chaotic effect of retrying thousands of cases in various states. In all of the following cases, the states have refused to apply the doctrine of *Boykin v. Alabama* retroactively: *Nachtigall v. Erickson*, 178 N.W. 2d 198 (South Dakota); *Endsley v. Capp*, 459 P. 2d 448, Ore. App.; *Ernst v. State*, 170 N.W. 2d 713, Wis.; *In re Tahl*, 460 P. 2d 449, Cal.; *State v. Griswold*, 457 P. 2d 331, Ariz.; *State v. Lindsey*, 171 N.W. 2d 859, Iowa; *State v. Urbano*, 457 P. 2d 343, Ariz.

CONCLUSION

It is apparent that, based upon the evidence before the trial court at the time the Post Conviction Relief was considered, defendant was fairly represented and fairly and voluntarily entered his plea. It is further apparent that if additional evidence is considered and all technical requirements were not explained to the satisfaction of the test in *Boykin v. Alabama*, that a retroactive application of such requirements would be devastating to every State.

Respectfully submitted,

WILLIAM F. MCKEE,
3 North Main Street,
Mansfield, Ohio 44902,
Counsel for Respondent.